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Housing and development board flats, trust and other equitable doctrines

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HOUSING AND DEVELOPMENT BOARD FLATS, TRUST AND OTHER EQUITABLE DOCTRINES

Although 85% of the population of Singapore reside in Housing and Development Board ("HDB") flats, this area of the law remains largely under investigated. A perennially contentious issue is the complex interplay between equitable doctrines and the Housing and Development Act. In this article, the author reviews the jurisprudence pertaining to express trust, resulting trust and common intention constructive trust and the HDB flat. This article will also examine the applicability of other doctrines such as *donatio mortis causa* and proprietary estoppel in relation to the HDB flat. In particular, this article will explore the applicability of the common intention constructive trust and proprietary estoppel in providing a potential remedy to disinherited wives and caregivers.

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I. Introduction

1 This essay investigates the interplay between equitable doctrines and the Housing and Development Act ("HDA").[1] As we will see, the drafters of the HDA initially started with an express prohibition against all forms of trust over Housing and Development Board ("HDB") flats. Since the HDB has strict rules on eligibility of ownership, it was concerned that persons who were ineligible to own a HDB flat might create trusts to circumvent these rules.[2] However, HDB discovered that such a blanket prohibition was an over-inclusive rule as it did not cater

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1 Cap 129, 2004 Rev Ed.

2 See *Singapore Parliamentary Debates, Official Report* (24 August 1984) vol 44 at col 2025 (Teh Cheang Wan, Minister for National Development).

to HDB flat owners who might legitimately want to create a trust in favour of their minor children. Early versions of the HDA also did not deal with the issue of the application of a resulting and constructive trust over HDB flats. Despite the legislator's hostility to the trust, the Singapore courts have interpreted the HDA purposively and held that resulting and constructive trust claims were not barred if it did not offend the HDB rules on eligibility of ownership. Various apparent attempts were then made by the drafters of the HDA to extinguish the resulting and constructive trust which proved to be unsuccessful; the courts continued to adopt a purposive reading of the HDA to preclude a resulting or constructive trust only in instances where it arises in favour of *ineligible* owners. The main argument in this paper is that modern equitable concepts are not to be feared; properly used, these doctrines might achieve fine-tuned justice between parties. In fact, as this essay will demonstrate, a complete prohibition against all forms of trusts arising over a HDB flat has the potential to create even more injustice between parties who might have a stake in the flat.

2 The main aim of this paper is to study the complex interplay between equitable doctrines and the HDA. In this article, the jurisprudence pertaining to express trust, resulting trust and common intention constructive trust and the HDB flat are reviewed. This article will also examine the applicability of other equitable doctrines such as *donatio mortis causa* and proprietary estoppel in relation to the HDB flat. In particular, this article will explore the applicability of the common intention constructive trust and proprietary estoppel in providing a potential remedy to disinherited wives and caregivers.

II. Eligibility conditions of ownership of HDB flats[3]

3 In order to make sense of the jurisprudence in this area, the eligibility conditions of ownership of HDB flats need to be understood. Under the HDA, the HDB is empowered to make rules with regard to a myriad of matters concerning the HDB flat.[4] This power includes the right to dictate conditions pertaining to the acquisition and the alienation of the flat, such as the person to whom the flat may be sold, the income ceiling of the potential purchaser, the citizenship status of buyer and the persons who are allowed to stay in the flat. The overarching

3 For an overview of the Housing and Development Board, see C L Tai, *Housing Policy and High-Rise Living A Study of Singapore's Public Housing* (Chopmen, 1988); *Housing a Nation[:] 25 Years of Public Housing in Singapore* (A Wong & S Yeh eds) (HDB, 1985); S Y Tan, *Private Ownership of Public Housing in Singapore* (Marshall Cavendish, 1998); *Tan Sook Yee's Principles of Singapore Land Law* (S Y Tan, H W Tang & K Low eds) (LexisNexis, 2009) ch 24.

4 Housing and Development Act (Cap 129, 2004 Rev Ed) s 65. See also D Ong, "HDB Policies: Shaping Family Practice" [2000] Sing JLS 110.

philosophy of the HDB's housing policy on eligibility conditions is stated to be "pro-family." Hence, the usual scheme[5] in which a person is eligible to buy a HDB flat is if he or she forms what is known as a "family nucleus". A "family nucleus" is defined by the HDB as consisting of a buyer and one of the following: (a) a spouse; (b) parents; (c) children (for a widower or divorcee); and (d) fiancé/fiancée. For potential purchasers of HDB flats who are orphans, the family nucleus may consist of siblings.

4 At this point, a few observations need to be made about these HDB rules on eligibility of ownership. First, these rules are dynamic and may be subject to change. For example, there has been a softening of the "pro family" policy as single persons over the age of 35 years are now allowed to purchase three room or smaller flats on the HDB resale market under the Single Singaporean Citizen Scheme.[6] Another example of such a change in policy is the Joint Singles Scheme, where two unrelated and unmarried Singaporeans who are older than 35 years old are eligible to jointly purchase a HDB flat. Second, while HDB insists in most cases that a purchaser must form a family nucleus, it does not mandate that the husband and wife must be registered as co-owners. Thus, it is possible for the husband or the wife to be registered as the sole owner and the other spouse who is not an owner to be listed as a permitted occupier. Finally, some important pre-conditions of acquiring a HDB flat include: (a) being a Singaporean or a Singapore permanent resident; (b) not owning another HDB flat[7] or private residential property in Singapore or elsewhere; and (c) being at least 21 years old.

III. Express trusts over HDB flats

5 As mentioned above, the original HDA contained a blanket prohibition on trusts created over HDB flats. This rule was contained in the former s 44 of the HDA, which provided that every such trust shall be regarded as null and void. Section 44(4) of the HDA used to provide:[8]

> Every trust or alleged trust, whether the trust is express, implied or constructive, which purports to be created in respect of any such flat, house or other building by the owner thereof shall be null and void and shall be incapable of being enforced by any court.

6 The rationale for this bright line rule was to prevent ineligible persons purchasing a HDB flat through nominees by way of a trust.

5 The best source of the HDB rules is via the HDB website <http://www.hdb.gov.sg/>.

6 See also H W Tang, "The Legal Representation of the Singaporean Home and the Influence of the Common Law" (2007) 37 HKLJ 81.

7 Housing and Development Act (Cap 129, 2004 Rev Ed) s 47.

8 Referred to in *Cheong Yoke Kuen v Cheong Kwok Kiong* [1999] 1 SLR(R) 1126 at [18].

While the original aim of this section was laudable, the general bar on the creation of a trust proved to be an overly wide rule. There are some circumstances, especially when minors are involved, where people may legitimately wish to settle an express trust over a HDB flat. As the then Minister for National Development, Mr Teh Cheang Wan, explained:[9]

> Over the years, however, there has been increasing need for the HDB to permit the creation of trusts for legitimate reasons. For example, it is necessary to empower trustees to hold flats in trust for minor children who are citizens in the event of death of the lessee parent, and where the surviving parent is neither a citizen nor a permanent resident and therefore not eligible to assume ownership of the flat. Similarly, in some cases of legal separation or divorce, flats have to be held in trust for minor children until they reach the age of 21 years.

7 Consequently, the HDA was amended to allow for trusts to be created in these circumstances. The current version of the legislation governing the express trust is contained in s 51(9) of the HDA,[10] which reads as follows: "[e]very trust which purports to be created in respect of any protected property without the prior written approval of the Board shall be null and void". Thus, the current position is this: the creation of an express trust over a HDB trust is not prohibited *per se*, only trusts which have not obtained prior written approval from the HDB are considered to be null and void. However, there is an aspect which remains unclear: the situations in which the HDB would consider the creation of a trust as being legitimate, apart from a trust created for minor children on the death of the lessee parent. For example, would the HDB approve a trust in the following circumstances: (a) a trust in favour of an offspring with special needs on the passing of the lessee parent?; and (b) a trust in favour of a lessee who has lost mental capacity? Logically, the HDB should have no objections to the creation of such trusts. It is suggested that the HDB should state clearly either on its website or subsidiary legislation instances in which it would approve the creation of a trust over a HDB flat. Such a move would certainly assist lessees, especially those with minor children and special needs dependents in planning their affairs.

8 The recent case of *Chong Sze Pak v Chong Ser Yoong*[11] is illustrative of an express trust which was clearly in breach of the HDA. In this case, the plaintiff claimed that he paid for all the outgoings of the HDB flat registered in the defendant's name, including the instalment payments of the HDB loan. In return, the defendant agreed by way of a deed to hold the HDB flat on trust for the plaintiff. Under the terms of

9 *Singapore Parliamentary Debates, Official Report* (24 August 1984) vol 44 at col 2025 (Teh Cheang Wan, Minister for National Development).

10 Housing and Development Act (Cap 129, 2004 Rev Ed) s 51(9).

11 [2011] 3 SLR 80.

the trust, the defendant was to transfer the HDB flat to the plaintiff's son when he turned 35 years old. The difficulty with the plaintiff's trust claim was the fact that the plaintiff was ineligible to purchase a HDB flat. Similarly, the plaintiff's son was also not entitled to purchase a HDB flat in his own name until he turned 35 years old. As such, Woo Bih Li J had no difficulty in holding the purported express trust in favour of the plaintiff and his son null and void.

9 There are numerous issues surrounding an approved express trust over a HDB flat which remains unanswered. For example, the precise procedure involved in obtaining approval for the creation of an express trust from the HDB is not found anywhere. The following hypothetical facts are used as an illustration to demonstrate the myriad of difficult issues that may arise due to this lack of clarity in procedure. Suppose X has a HDB flat which was purchased in his own name when he was 35 years old and a single person. Subsequently, X married Y. X and Y have a daughter together, Z. Shortly after the birth of their daughter, X discovers he has a terminal disease. X now wishes to bequeath the HDB flat solely to his minor child, Z. Since Z is a minor and cannot hold property in her own name, a trust must be created in Z's favour. X has the following three ways to deal with the bequest to Z:

> *Option A*: X makes a Will leaving the HDB flat to Z. Upon X passing away, X's executors would draw up the necessary trust deed naming Z as the beneficiary. Before settling the trust, X's executors would seek HDB's written approval in relation to this express trust. Once HDB's approval is given, the flat would then be transferred to the trustees to be held on trust for Z.
>
> *Option B*: X creates a trust in favour of Z in his Will, naming the trustees and stipulating the terms of the trust. X seeks HDB's written approval of the express trust to be created in the Will after the Will has been executed. Once HDB's approval is given, the flat would then be transferred to the trustees upon X's death to be held on trust for Z.
>
> *Option C*: X creates a trust in favour of Z in his Will, naming the trustees and the terms of the trust. No approval is sought from HDB at the time when the Will is executed. Upon X passing away, X's executors would seek HDB's written approval of the trust created in the Will. Once HDB's approval is given, the flat would then be transferred to the trustees upon X's death to be held on trust for Z.

10 Option A and Option B appear to be the safest options in carrying out X's bequest to Z. Option A leaves the issue of settling the trust to X's executors whereas in Option B, the Will actually creates the trust for Z's benefit. Although both methods would probably achieve the same result, the drawback to Option B is this: would HDB entertain

such a request for written approval at this stage? Or would HDB take the position that such a request for written approval to be premature? It is respectfully suggested that HDB should entertain such requests for approval rather than rejecting such requests as being premature because such an approach would give peace of mind to property owners who will have the certainty that the trust will be created upon their demise.

11 Option C is trickier to analyse. There are two possible analyses of the possible outcome of an unapproved express trust over a HDB flat contained in the Will. The first analysis is that the trust is void due to the literal wording of s 51(9) of the HDA.[12] The argument in support of this analysis is that since the Will purports to create a trust, the testamentary trust is properly constituted once the testator passes away if the debts, taxes and expenses of the estate do not exhaust the HDB flat. If the proposition that the trust is constituted immediately upon death of the testator is correct, then there is the argument that the purported trust is automatically avoided by s 51(9) of the HDA. This is because the words used in s 51(9) is unequivocal in prohibiting an unapproved express trust, that "every trust … without the prior written approval of the Board shall be null and void" as compared to the relevant provisions on constructive and resulting trusts of the HDA.[13] Since the trust had been properly constituted and rendered ineffective by s 51(9) of the HDA, it is too late for the executors of the Will to seek approval from HDB. Such an analysis is also consistent with the general maxims of equity: "equity will not assist a volunteer" and "equity does not perfect an imperfect gift". This is the likely position that would be argued by the beneficiaries of the residuary clause in the Will or the disinherited wife, Y, if there is no residuary clause in the Will. If the trust is avoided, then the HDB flat falls to be distributed *as per* the residuary clause in the Will. Absent a residuary clause, the HDB flat would then be governed by the Intestate Succession Act.[14] A possible criticism of this conclusion is that this analysis is unduly harsh to the child, Z, and does not facilitate the intention of the testator who intended to bequeath the whole HDB flat to the child albeit by way of a trust. However, it is possible to meet this criticism. In this case, Z is not left without a remedy; she has a right to sue the solicitor (by using her next friend as her litigation representative) who drafted the Will for negligence pursuant to *White v Jones*.[15] The measure of damages in this case would be the solicitor's negligent drafting which ultimately caused Z to lose half the share in the HDB flat. Since Z would be properly compensated by the solicitor or his or her insurers, Y can argue that the courts should not adopt a strained construction of the HDA and "rescue" the purported trust. Otherwise,

12 Housing and Development Act (Cap 129, 2004 Rev Ed) s 51(9).
13 See s 51(10) of the Housing and Development Act (Cap 129, 2004 Rev Ed).
14 Cap 146, 1985 Rev Ed.
15 [1995] 2 AC 207.

to validate the purported trust would be tantamount to an unjustified redistribution of property rights.

12 An alternative analysis validating the unapproved trust in Option C is equally possible. As Lord Browne-Wilkinson said in *T Choithram International SA v Pagarani*,[16] "[a]lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift". Consistent with this philosophy, it is suggested that the courts might adopt a more benevolent construction in order to save the trust. As such, it could be possible that the trust over the HDB flat is saved by the *Re Rose*[17] doctrine. Recall *Re Rose* stands for the proposition that equity treats a transfer of property as complete in equity if the donor did everything in his or her power to transfer the property to the donee. Similarly, it could be argued by analogy that in this case the trust is valid, save for the final step of asking for approval from the HDB. In other words, the trust is characterised as not fully constituted save for the approval from HDB. Hence, the executors and/or the prospective trustees could perfect the trust by asking for HDB's approval after the testator's demise. If the trust is inoffensive *vis-à-vis* HDB policies, the HDB can give the necessary approval. Yet another characterisation saving the trust is to argue that the trust was not constituted upon X's demise. At that time, Z's interest in the unadministered estate was merely a *spes* or a hope.[18] Whether Z's interest crystalises will depend on HDB's approval and the fact that the debts and expenses of the estate do not exhaust the HDB flat. Thus, the executors could seek HDB's approval for the trust and HDB is entitled to give such approval. As a matter of drafting, it could therefore be advantageous to insert into the Will that the intended trust for the minor is "subject to HDB's approval".

13 However, the analyses above in favour of saving the trust will *not* work if the terms of the purported trust in the Will are incompatible with HDB policies. An illustration of a trust which might offend HDB policies is a trust which directs the trustee to exclude the testator's wife and child from staying in the flat and mandating the trustee to lease out the whole HDB flat to third parties in order to accumulate an income for the testator's child. Such a direction to the trustee could be argued to be in breach of prevailing HDB policies on subletting of the whole HDB flat. If so, it follows that HDB cannot give approval to such a trust which offends its own policies. Can the executors of the Will or prospective trustees then amend the terms of the trust and submit a modified trust

16 [2001] 1 WLR 1 at 11 (noted J Hopkins, "Constitution of – A Novel Point" (2001) 60 CLJ 483; C Rickett, "Completely Constituting an *Inter Vivos* Trust: Property Rules?" [2001] Conv 515).

17 [1952] Ch 499. See also *Pennington v Waine, Crampton* [2002] 1 WLR 2075 (noted T M Yeo & H Tjio "*Re Rose* Revisited – The Shorn Lamb's Equity" [2002] LMCLQ 296; C H Tham, "Careless Share Giving" (2006) 70 Conv 411).

18 *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694.

to HDB for approval? It is suggested that the executors or prospective trustees do not have such a right to do so for two reasons. First, the executors of the Will or prospective trustees do not have a power to rewrite the terms of the intended trust. It is a cardinal principle that a trustee derives his or her power from the original trust document. If the trust document contemplates that the trust property is to be used in a certain manner which renders it void, the executors of the Will or trustee cannot unilaterally change the terms of the trust in an attempt to validate the trust. A simple hypothetical example supports this position. Let us say the trust contemplates that beneficial interest would only vest in the beneficiary after the perpetuity period. The trustee or the executors of the Will cannot save such a trust by unilaterally declaring that the trust is to vest within the perpetuity period. In such a case, the trust is simply invalid due to the rule against remoteness of vesting. Similarly, if the document which creates the trust (in this case the Will) contemplates an arrangement which is in breach of HDB policies, it is suggested that the executors of the Will or the prospective trustees do not have a right to vary the terms of the trust in order to persuade HDB to approve the trust.

14 The second objection to the executors or the prospective trustees varying the trust is that there is the difficulty in identifying the source of the executor's or prospective trustee's right to amend the trust. Unlike England, there is no specific legislation in Singapore which allows the trustee to vary the terms of a trust.[19] Thus, a trustee may only vary the terms of a trust if there is a provision for variation in the trust documents. This is the first hurdle to variation. Even if the Will contains an express clause allowing the trustee to vary the terms of the trust, there is the further conceptual difficulty of invoking such a clause. This is because the argument in favour of saving the trust over the HDB flat is that the trust has not been constituted pending HDB's approval. If this is the correct analysis, then it is difficult to make the argument that the prospective trustee may invoke a term in a trust to amend a trust which has not yet been constituted.

15 A possible solution to the conundrum described above is to draft the trust as an *executory trust*.[20] The learned editors of *Underhill and Hayton, Law of Trusts and Trustees*[21] defines an executory trust as follows:

> An executory trust is one where the trust property is vested in trustees or personal representatives but the interests to be taken by the

19 See M Hwang & N Thio, "Why does Singapore not have a Variation of Trusts Act?" (2011) 23 SAcLJ 58.

20 The author is immensely grateful to the anonymous referee for highlighting this point.

21 (David Hayton gen ed) (LexisNexis, 2010) at p 101.

> beneficiaries remain to be delimited in some subsequent instrument pursuant to the settlor's clear general intention or where the property intended to be subjected to trusts is the subject of an enforceable agreement to create a trust whether for delimited beneficiaries or beneficiaries that remain to be delimited. [reference omitted]

16 If the trust is drafted as an executory trust, this will permit the personal representatives of the estate to draw up a detailed trust deed after the death of the testator which will include obtaining HDB's approval. The option of an executory trust might be an ideal solution to this problem. In other words, the executory trust is able to further the testamentary wishes of the HDB owner and does not require HDB to prematurely approve a trust in a Will.

17 The discussion above demonstrates that there is so much uncertainty surrounding the simple process of bequeathing a HDB flat to a minor child. This is an extremely unsatisfactory situation as this is a common occurrence facing many HDB owners with minor children. The current complicated and opaque legal position surrounding this process represents a trap for the unwary testator whose wishes may be frustrated if his or her legal advisor did not draft the Will in the appropriate manner and seek HDB approval in a timely manner. In order to encourage people to plan for their next of kin, the process should be streamlined and made clear. It is, therefore, suggested that it is incumbent on HDB to make the process of bequeathing a HDB flat to a minor child more transparent, either by way of subsidiary legislation or a prescribed procedure published on its website. If HDB's position is for HDB owners to draft an executory trust, then this should be clearly stated on their website. Furthermore, it would be helpful to list guidelines on the terms of a trust which HDB would find acceptable. Correspondingly, HDB should also give examples of trust terms which would be rejected by HDB.

IV. Resulting trusts over HDB flats

18 The jurisprudence surrounding resulting trusts over HDB flats has a chequered history. Numerous legislative attempts were made to apparently extinguish the doctrine of resulting trusts *vis-à-vis* HDB flats and yet the Singapore courts have consistently refused to interpret these legislative amendments as completely ruling out the operation of a resulting trust. As a starting point, the overriding principle in this area is that a resulting trust over a HDB flat in favour of a person *ineligible* to own a HDB flat must be prohibited. Otherwise, ineligible persons would provide the purchase price to eligible persons to buy a HDB flat and assert a purchase price resulting trust over the property. To recognise such a resulting trust would defeat HDB's strict conditions of eligibility to acquire a HDB flat.

19 *Cheong Yoke Kuen v Cheong Kwok Keong*[22] ("*Cheong Yoke Kuen*") is an illustration of the principle against declaring a resulting trust over a HDB flat in favour of an ineligible person. In this case, a mother and son were co-owners of the HDB flat. Subsequently, the son was allocated a new HDB flat. Under HDB rules, a person was not entitled to own more than one HDB flat. Consequently, the son transferred his interest to his mother who became the sole owner. Some years later, the mother passed away intestate. The son asserted a resulting trust over the mother's HDB flat on the ground that he paid for, *inter alia*, the down payment and all the outgoings in relation to the HDB flat. However, this claim was resisted by the mother's estate; the primary contention was that the resulting trust was in breach of the then s 51(4) of the HDA.[23] Section 51(4) of the HDA provided that "[n]o trust … shall be created by the owner thereof without prior written approval of the Board". As a starting point of his analysis, L P Thean JA said: "It [a resulting trust] arises from a certain transaction carried out intentionally by the parties concerned and the court infers an intention to create a trust in favour of a party."[24] On the evidence, L P Thean JA reasoned that when the son "transferred his interest in the flat to the mother, he intended to remain the beneficial owner of the flat. By such transfer he in effect 'created' a trust of the flat in his favour."[25] Therefore, the Court of Appeal held that the resulting trust was in breach of s 51(4) of the HDA since it was "created" by the son.

20 The ultimate holding of *Cheong Yoke Kuen* is undoubtedly correct. What is controversial is LP Thean JA's characterisation that a resulting trust was "created" by the son given the fact that the jurisprudential basis of the resulting trust is a heavily contested subject.[26] Perhaps a better rationalisation of this case is that the son had an express (albeit unarticulated) intention of retaining an equitable interest in the HDB flat and only granted his mother a life interest over the flat. This is consistent with the son's evidence that the HDB flat was not an outright gift to his mother but only for the mother to live there during her lifetime. It follows that the son's claim was essentially an attempt to maintain an *express* trust over the flat with the mother as a trustee holding the reversionary interest for him. Such a claim premised on an express trust fails because: (a) the HDA bars an unapproved express trust; (b) there was no evidence that the intention to create an express trust was shared by his late mother; and (c) there was a lack of compliance with formality provisions in settling the express trust.

22 [1999] 1 SLR(R) 1126.
23 Housing and Development Act (Cap 129, 1997 Rev Ed).
24 *Cheong Yoke Kuen v Cheong Kwok Keong* [1999] 1 SLR(R) 1126 at [17].
25 *Cheong Yoke Kuen v Cheong Kwok Keong* [1999] 1 SLR(R) 1126 at [20].
26 See critique by B Crown, "Trusts of HDB Flats" [1999] Sing JLS 635. On resulting trusts, see *Tan Sook Yee's Principles of Singapore Land Law* (S Y Tan, H W Tang & K Low eds) (LexisNexis, 2009) at pp 129–141.

21 In *Cheong Yoke Kuen*, L P Thean JA expressed some sympathy for the son despite dismissing his claim. In refusing to order costs against the son, the learned judge said:[27]

> [The son] had done a lot for the family *eg* providing a home for the mother, and at one time for the first and third appellants [his siblings], and the flat was acquired solely by his own effort. None of the appellants had made any contribution towards the acquisition; but, they would soon be getting a piece of the windfall.

22 The discussion above demonstrates that a co-owner who transfers his or her share of the HDB flat to the other co-owner is precluded from asserting a trust by reason of the HDA if the co-owner is no longer eligible to own the flat due to HDB rules.[28] In such circumstances, it would be better for the co-owner to apply to court for a sale in lieu of partition,[29] rather than attempt to assert a resulting trust claim after the flat had been transferred. *Gurnam Kaur v Harbhajan Singh*[30] is an illustration of an application for a judicial sale. The plaintiff, a widow, and the defendant, her son, were joint tenants of a HDB flat. The son got married and the relationship between mother and son deteriorated to such an extent that the mother left the flat. The mother instituted court proceedings seeking an order that the joint tenancy be severed and for the property to be sold and that the net proceeds to be divided between her and the son. The application was allowed by Tan Lee Meng J. If a co-owner needed a place to stay during his or her lifetime, it is suggested that the court could fashion appropriate remedies during the application for sale. For example, borrowing from family law jurisprudence, the court could order the flat to be transferred to a co-owner with the consideration to be paid by the other co-owner at a later date.

23 The subsequent two cases of *Sitiawah Bee bte Kader v Rosiyah bte Abdullah*[31] ("*Sitiawah*") and *Neo Boh Tan v Ng Kim Whatt*[32] are instances where the courts declared resulting trusts in favour of eligible claimants. In *Sitiawah*, a mother and daughter were registered as joint tenants of a HDB flat in Ang Mo Kio. The purchase price was $27,100.00. The father paid $6,231.00 and the remainder was paid from

27 *Cheong Yoke Kuen v Cheong Kwok Keong* [1999] 1 SLR(R) 1126 at [28].

28 An interesting question is whether a claimant is entitled to seek restitution for contributing to the purchase price of the flat by asserting an unjust enrichment claim. The difficulty with such a claim would be establishing the ground of restitution or "unjust factor" and whether the HDA precludes an unjust enrichment claim. This issue is beyond the scope of this article.

29 See Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 18(2), First Sch para 2.

30 [2004] 4 SLR(R) 420.

31 [1999] 3 SLR(R) 606.

32 [2000] SGHC 31.

the daughter's Central Provident Fund. Subsequently, the relationship became strained and the mother applied to court for the HDB flat to be sold. In determining the respective shares of the parties, the daughter asserted a resulting trust as she had paid more towards the acquisition of the flat. Before the hearing, the mother attempted to unilaterally sever the joint tenancy. As a finding of fact, S Rajendran J found that the father had paid the moneys on behalf of the mother. The learned judge crystalised the question at hand as such:[33]

> Does the resulting trust postulated as a result of unequal contributions to the purchase price survive the application of s 51(4)? [of the HDA]

24 Rajendran J held that in the present case, the resulting trust was not "created" by a flat owner but arose by reason of a presumption of law. As such, the learned judge held that the prohibition against the creation of a trust found in the HDA did not preclude an eligible owner from claiming for a larger share via a purchase price resulting trust. Rajendran J therefore ordered that the flat be sold and the proceeds of the sale to be divided between the mother and daughter in the ratio of 23:77. Besides the holding that a resulting trust may arise in favour of an eligible co-owner, the other important point of *Sitiawah* is that a purported severance of a joint tenancy does not preclude a court from declaring that the co-owners hold the flat in shares proportionate to their initial contribution to the purchase price. In *Sitiawah*, the mother had unilaterally severed the joint tenancy before the hearing and yet the judge declared a resulting trust over the HDB flat.

25 The second case which allowed a resulting trust claim in favour of an eligible person is *Neo Boh Tan v Ng Kim Whatt*[34] ("*Neo Boh Tan*"). In this case, the mother and her youngest son were the joint owners of a HDB flat. The mother paid the down payment and serviced the loan taken to purchase the flat. In August 1998, the son hit his mother and the mother made a police report. Subsequently, the son moved out of the flat and the mother lost all contact with her son. The mother applied for a declaration that she was absolutely entitled to the HDB flat. In this action, the son could not be located and the proceedings were served on him by substituted service which included, *inter alia*, an advertisement published in a Chinese newspaper. Judith Prakash J followed *Sitiawah* and held that the resulting trust in favour of the mother was not in breach of s 51(4) of the HDA. On the facts of *Neo Boh Tan*, the mother was eligible to own the HDB flat and therefore HDB policies were not infringed. One unexplored aspect of *Neo Boh Tan* is whether a resulting trust claim which effectively gives the claimant 100% interest in the flat would be in breach of HDB rules. In this case, the flat was allocated

33 *Sitiawah Bee bte Kader v Rosiyah bte Abdullah* [1999] 3 SLR(R) 606 at [13].
34 [2000] SGHC 31.

pursuant to HDB's Resettlement Scheme and there was no evidence before the court that the scheme mandated that the HDB flat *must* be jointly owned. Furthermore, even if HDB rules mandated joint ownership under a certain scheme, the claimant may overcome this objection easily as a matter of pleadings; the claimant could simply not ask for 100% of the share of the flat. Thus, if joint ownership is mandated by HDB rules, then a claimant may ask for 99% share of the flat by pleading that he or she has provided for 99% of the purchase price.

26 In September 2005, s 51(6) of the HDA was enacted. Section 51(6) provided:[35]

> No person shall become entitled to any such flat, house or other building under any resulting trust or constructive trust, whensoever created.

27 This legislative provision gave rise to the following question: was there now an absolute prohibition against the finding of a resulting trust over HDB flats? *Tan Chui Lian v Neo Liew Eng*[36] ("*Tan Chui Lian*") was the first case to interpret this provision. In this case, the son and father owned the flat as tenants-in-common. Upon his father's death, the son applied to court for an order that the HDB flat be sold on the open market with the sale proceeds to be divided in the ratio of the contribution of the parties towards the purchase moneys of the flat. The purchase price of the flat was approximately $29,000.00 in 1979. The son had contributed $21,000.00 and the father $8,000.00. The father had also contributed $10,000.00 towards the costs of renovation at the time the property was purchased, $5,300.00 towards renovation costs undertaken in 1997 and $3,553.45 being the estate upgrading costs imposed by the HDB subsequently. Due to these contributions, the father's estate argued that a constructive or resulting trust arose in favour of the estate. There was an initial issue of whether a constructive or resulting trust can arise over an HDB flat because of s 51(6) of the HDA. Sundaresh Menon JC (as he then was) applied the decisions of *Sitiawah*[37] and *Neo Boh Tan*[38] and held that a constructive or a resulting trust could arise over an HDB flat between two *eligible* co-owners of the flat. As a matter of statutory interpretation, Menon JC reasoned that s 51(6) of the HDA only prohibited constructive or resulting trusts arising in favour of persons who would otherwise have been *ineligible* to acquire an interest in an HDB flat. In other words, the section was meant to:[39]

35 Housing and Development Act (Cap 129, 2004 Rev Ed) s 51(6).
36 [2007] 1 SLR(R) 265.
37 [1999] 3 SLR(R) 606.
38 [2000] SGHC 31.
39 *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265 at [10].

> … prevent any entitlement to own an HDB flat arising in favour of a person by virtue of the law implying a resulting or constructive trust, where that person would otherwise have been ineligible to acquire such an interest.

28 Menon JC said that this interpretation is bolstered by the fact that s 51(6) of the HDA used the phrase "[n]o person shall become entitled" to an interest as opposed to the phrase "no person shall acquire" an interest in an HDB flat. These words suggest that s 51(6) of the HDA was merely a codification of the previous law. Furthermore, Menon JC pointed out that this provision seemed to be retrospective in nature. A restrictive construction would mean that Parliament was retrospectively displacing accrued property rights and there was nothing in the Parliamentary Debates that suggested that this was the legislative intent. As such, Menon JC reasoned that since both co-owners were eligible to be HDB owners in the present case, the situation fell outside the mischief of s 51(6). Menon JC's holding is obviously correct.

29 It should be noted that s 51(6) is now found in s 51(10). Section 51(10) reads:[40]

> No person shall become entitled to any protected property (or any interest in such property) under any resulting trust or constructive trust whensoever created or arising.

30 The interesting question is whether s 51(10) statutorily overturns the holding of *Tan Chui Lian*.[41] One interpretation is that the prohibition against resulting trust or constructive trust over HDB flats "*whensoever … arising*" is meant to address the point made by Rajendran J in *Sitiawah*. The learned judge had reasoned in that case that a resulting trust arose by operation of law and was not created by the parties and was therefore not prohibited by the words of the Act. Hence, on this argument, an assertion of a resulting trust will fail because s 51(10) specifically prevents a resulting trust from arising. On reflection, it is argued that the amendments to s 51(10) cannot be taken to have statutorily overturned *Tan Chui Lian* for two reasons. First, one of the main planks of Menon JC's reasoning is that the provision in the HDA only prevents a resulting or constructive trust arising in favour of a person who is ineligible to own an HDB flat. Since the crucial phrase "[n]o person shall become entitled" remains in the section, it is suggested that *Tan Chui Lian* is still good law. Such an interpretation was recently confirmed by Prakash J in *Koh Cheong Heng v Ho Yee Fong*.[42] Prakash J said:[43]

40 Housing and Development Act (Cap 129, 2004 Rev Ed) s 51(10).
41 *Tan Chui Lian v Neo Liew Eng* [2007] 1 SLR(R) 265.
42 [2011] 3 SLR 125.
43 [2011] 3 SLR 125 at [56].

> Although the amended legislation includes the words 'or arising' at the end of the relevant provision, in my opinion the addition of the words 'or arising' only clarify that a 'resulting trust' or a 'constructive trust' may be more properly said to arise by operation of law, rather than by the creation of parties. It is neither evident from Hansard, nor from the plain reading of the provision, that Parliament was seeking to change the legal position as it stood in *Tan Chui Lian*. Indeed, if such a change was deemed necessary, Parliament could have said for instance, 'No person shall become entitled, *regardless of eligibility*, …'. This Parliament did not do. Furthermore, the words 'become entitled', which formed the basis for Menon JC's judgment, were left unchanged by Parliament. As Menon JC expressly noted in his judgment, it would have been much 'plainer and simpler' for Parliament to have said that no person shall 'be entitled to any interest in' an HDB flat if Parliament were indeed minded to prohibit *all* trusts, regardless of the beneficiary's eligibility (*Tan Chui Lian* at [11]). Again, Parliament did not make such a change. Accordingly, in my view, the law regarding creation of trusts over HDB property remains as stated in *Tan Chui Lian*. [emphasis in original]

31 Second, as Menon JC pointed out, resulting and constructive trusts are *accrued* property rights. Although Singapore's Constitution[44] does not elevate property ownership to a constitutional right, deprivation of accrued property rights is a grave matter that must at least be debated and seriously considered in Parliament. It does not appear that there was any trace of such a debate in Parliament. Section 51(10) was amended on the back of amendments to matters relating to caveats and moneylenders and all the discussion in Parliament was about the issue of moneylenders *caveating* HDB flats. As such, it is suggested that it could not be Parliament's intention to deprive eligible owners of accrued property rights.

32 The resulting trust doctrine is also useful in the context of Muslim divorces where the property issue is not resolved by the Syariah Court. Section 35 of the Administration of Muslim Law Act[45] provides that the Syariah Court has the jurisdiction to hear *inter alia*:[46]

> … all actions and proceedings in which all the parties are Muslims or where the parties were married under the provisions of the Muslim law and which involve disputes relating to … (*b*) divorces known in the Muslim law as *fasakh*, *cerai taklik*, *khuluk* and *talak*; or (*d*) the disposition or division of property on divorce or nullification of marriage …

44 Constitution of the Republic of Singapore (1999 Rev Ed).
45 Cap 3, 2009 Rev Ed.
46 Administration of Muslim Law Act (Cap 3, 2009 Rev Ed) s 35(2).

33 In the context of a Muslim divorce, the Syariah Court has the jurisdiction to hear parties on the issue of division of property. However, in some cases the issue of the division of property might not be before the Syariah Court. *Hartinah bte Sahlan v Mohammed Juma'at Dollar*[47] ("*Hartinah*") is an illustration of such a situation. In *Hartinah*, two actions were consolidated and heard by the High Court. Both cases involved a divorce by consent registered by a *kadi* of the Syariah Court. In other words, there were no divorce proceedings and the division of matrimonial property was not a live issue before the Syariah Court. This was unfortunate because the HDB flat was registered in joint names. Subsequently, the claimants in both actions applied to the High Court for a declaration of a resulting trust over the HDB flat. As a preliminary matter, the High Court had to determine whether it had the necessary jurisdiction to hear this dispute. In holding that the High Court had the necessary jurisdiction to hear this dispute, Christopher Lau JC followed the analysis of Chan Sek Keong J in *Muhd Munir v Noor Hidah*[48] ("*Muhd Munir*"). In *Muhd Munir*, Chan J said that one of the pre-conditions for the Syariah Court to assume jurisdiction is that there must be occasion for the Syariah Court to exercise its power. Chan J said that an instance where the Syariah Court had *no* occasion to exercise its power on custody of minor children is a situation where there is no divorce application before the Syariah Court and where the parties divorced through a *kadi*. Although *Muhd Munir* was concerned with the issue of custody of Muslim children, Lau JC found Chan J's analysis very apt. On the facts, since there was no occasion for the Syariah Court to exercise its power on division of matrimonial property, Lau JC felt that the High Court was not constrained by the Administration of Muslim Law Act. Lau JC declared a purchase price resulting trust in favour of the plaintiffs in both cases.

34 Before leaving this area, there is a practical point on the burden of proof involved in a resulting trust claim which needs to be developed. The case of *Loo Chay Sit v Estate of Loo Chay Loo, deceased*[49] provides useful guidance on this issue. Here, there was an alleged resulting trust over a property at 7 Margate Road. The property was registered in the name of Loo Chay Loo who immigrated to the US. Loo Chay Loo murdered his adopted son in the US and then attempted to commit suicide. While Loo Chay Loo was in a coma in a hospital in the US, Loo Chay Sit, the older brother, instituted an action alleging that Loo Chay Loo held the property on resulting trust for him by reason of a purchase price resulting trust. Thus, this entire case turned on a question of fact: was the claimant able to prove on a balance of probabilities that he paid for the purchase price? Andrew Phang JA who delivered the judgment of

47 [1998] 2 SLR(R) 103.
48 [1998] 2 SLR(R) 103 at [14].
49 [2010] 1 SLR 286.

the Court of Appeal went through a meticulous exposition of the law pertaining to the burden of proof which is beyond the scope of this essay. For the purposes of this essay, it is sufficient to note that the starting position is that since the property was registered in Loo Chay Loo's name, the estate was entitled to rely on the presumption of indefeasibility by reason of s 46 of the Land Titles Act.[50] In order for Loo Chay Sit to displace Loo Chay Loo's title, Loo Chay Sit had to prove that Loo Chay Sit paid for the property so as to establish a resulting trust. Thus, Loo Chay Sit bore the primary legal burden of proving his case. The facts surrounding the payment of the purchase price were murky because the property was bought in the 1970s and the documentation involving the purchase price was unsatisfactory. On the facts, the Court of Appeal found that the estate of Loo Chay Loo had proved that Loo Chay Sit *did not* pay for the property but was unable to prove that Loo Chay Loo had paid for the purchase price. As such, the estate of Loo Chay Loo succeeded in dismissing the resulting trust claim because the estate was entitled to rely on the presumption of indefeasibility. Therefore, in a purchase price resulting trust claim, the claimant will have the onus of proving that he or she provided for the purchase price. In contrast, there is no obligation on the defendant to demonstrate an affirmative defence, that the defendant was the one who came up with the purchase price. The defendant is entitled to rely on the register to establish the *prima facie* position of ownership.

35 In this author's recent paper on "Conflict in Land Law Jurisprudence I: Co-Ownership and Collective Sales",[51] it was suggested that given the practical difficulties associated with the resulting trusts, the policy makers at the Land Registry may wish to consider providing co-owners with the option of holding the property on an irrebuttable joint tenancy in the appropriate land transfer form. This suggestion could be equally applicable to HDB flats; HDB could introduce a mandatory form to be filled in at the time of acquisition of the flat giving the co-owners the option of stating that the parties intend to hold the property on an irrebuttable joint tenancy or in irrebuttable fixed shares as tenants in common. Such a form would as a matter of evidence preclude the assertion of a resulting trust. Over time, such a move might reduce the incidence of resulting trust claims in future. However, in reviewing the cases on resulting trusts in this area, this author has become more ambivalent about the earlier suggestion. While a form stipulating an irrebuttable joint tenancy or irrebuttable tenancy in common would certainly promote certainty, it appears to be a blunt

50 Cap 157, 2004 Rev Ed.

51 H W Tang, "Conflict in Land Law Jurisprudence I: Co-Ownership and Collective Sales" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspective* (T M Yeo, H Tjio & H W Tang gen eds) (Singapore Academy of Law, 2011) at p 519.

instrument as opposed to the resulting trust doctrine which is a more sensitive doctrine in achieving justice between the parties. For example, in *Neo Boh Tan*,[52] the resulting trust yielded a favourable result for the mother who paid for the entire purchase price of the flat and suffered elder abuse in the hands of the other co-owner, her own son. Similarly, in *Hartinah*, one of the claimants, the wife, was able to obtain a declaration for 76% share of the HDB flat against the other co-owner, her husband, who had been in and out of drug rehabilitation centres and prison. The cases in this area demonstrate the perennial struggle that judges and lawmakers face in crafting a law which promotes certainty and yet is capable of achieving justice between the parties. Perhaps some degree of uncertainty in this area is a worthwhile price to pay so that an equitable result in these complex familial relationships may be reached.

V. Common intention constructive trusts over HDB flats

36 While the resulting trust is commonly argued in relation to a HDB flat, there is not much case law on the common intention constructive trust. It is easy to explain the paucity of decisions on the common intention constructive trust in Singapore. Typically, the common intention constructive trust is used as a means to divide the property of unmarried couples when the relationship breaks down. This is because the couple being unmarried[53] cannot resort to the provisions of the Women's Charter[54] to settle the issue of division of property. Unlike England, long term co-habitation is rarer in Singapore due to cultural and differing social norms. In this regard, the law's ambivalence with regards to co-habitation is illustrated by V K Rajah JA's judgment in *Lau Siew Kim v Yeo Guan Chye Terence*,[55] where he refused to extend the presumption of advancement to co-habiting couples, saying that "given that legislative recognition and public consensus about the status of *de facto* relationships have yet to emerge locally",[56] the extension of the presumption of advancement to such relationships is presently unwarranted. Quite apart from this, it is also surmised that there is an economic reason why long term co-habitation and property disputes are rare in Singapore. Due to the very high costs of property, it is speculated

52 [2000] SGHC 31.

53 For a recent example involving an unmarried couple, see *Wong Meng Cheong v Ling Ai Wah* [2012] 1 SLR 549.

54 Cap 353, 2009 Rev Ed.

55 [2008] 2 SLR(R) 108.

56 [2008] 2 SLR(R) 108 at [63]. On the presumption of advancement, see T H Tey, "Singapore's Muddled Presumption of Advancement" [2007] 2 Sing JLS 240; K Low, "Apparent Gifts: Re-Examining the Equitable Presumptions" (2008) 124 LQR 369; R Yeo, "The Presumptions of Resulting Trust and Advancement in Singapore: Unfairness to the Woman?" (2010) 24 *International Journal of Family Law and Policy* 123.

that unmarried couples would rather prefer to enter a short-term lease of a home instead of purchasing a property together. As such, if the relationship breaks down, there is no dispute over a property which is acquired during the co-habitation period.

37 With regard to HDB flats, the common intention constructive trust arises infrequently because couples usually get married prior to the acquisition of the HDB flat.[57] In the days when there was a long waiting list for HDB flats, couples would first go through the civil process of marriage at the Registry of Marriages in order to be eligible to buy a HDB flat, before holding the traditional wedding ceremony some months later. It is postulated that this housing policy has had the social effect of encouraging couples to get married rather than co-habitating with each other. By getting married, the couple becomes eligible to buy a HDB flat and pool their Central Provident Funds to service the mortgage payments. If the relationship breaks down, the couple would usually resolve disputes over the property by way of the provisions in the Women's Charter and not through the doctrine of the common intention constructive trust.

38 Thus far, there is only one reported case involving a common intention constructive trust over a HDB flat. In *Tan Poh Soon v Phua Sin Yin*,[58] the couple was married in 1963 and the flat was acquired in the husband's sole name. In 1969, the husband moved to the Netherlands without his wife. In 1989 or 1990, the husband instituted divorce proceedings against the wife in the Netherlands and the Dutch court granted the divorce. No ancillary relief was sought in the Dutch divorce proceedings. Subsequently, the wife filed an originating summons in Singapore asking for, *inter alia*, a declaration that she was entitled to a share of the HDB flat pursuant to s 56 of the Women's Charter, which provided that the judge may make such order with respect of the property as he or she thinks fit. This section has been interpreted by P Coomaraswamy J in *PQR v STR*[59] as being premised on the "cold principles of English property law and especially that of the law of trusts". In *Tan Poh Soon*, G P Selvam J applied the doctrine of the common intention constructive trust as articulated in *Lloyds Bank v Rosset*[60] to the facts at hand. As a preliminary matter, Selvam J did not think that then s 51 of the HDA prohibiting a trust over a HDB flat nullified the court's power to declare a common intention constructive trust. The judge rightly said that a constructive trust was not created by the owner but rather decreed by the court pursuant to a statutory

57 See C Tan, "'We are Registered': Actual Processes and the Law of Marriage in Singapore" (1999) 13 IJLPF 1.
58 [1995] 2 SLR(R) 583.
59 [1992] 3 SLR(R) 744 at [10].
60 [1991] 1 AC 107.

provision. On the facts, the learned judge declared there was a constructive trust in favour of the wife. As a matter of evidence, the judge found that the husband had told the wife that there was no need to include her name as the flat was for both of them. In terms of detriment and reliance, the wife had made substantial contribution to the maintenance and payment of conservancy and other charges in respect of the flat. Furthermore, the learned judge said that the wife was prevented from purchasing another HDB flat in her own name by remaining in the relationship. Finally, if the wife had not stayed in the HDB flat, the flat would have been "compulsorily acquired" by HDB. Therefore, Selvam J held that the elements of a common intention constructive trust was satisfied and declared that the wife had a half share over the HDB flat.

39 *Tan Poh Soon* is potentially an important decision because G P Selvam J's ultimate holding was extremely generous to the wife: a declaration of 50% share in favour of the wife of a HDB flat purchased solely in her husband's name. In this case, the wife did not seem to have contributed a lot in monetary terms save for the payment of the maintenance and conservancy charges. In order to get over this problem, Selvam J construed the wife's continued occupation of the HDB flat as a form of detriment because this prevented her from buying her own flat. However, it should be pointed out that this case is unusual because there was evidence of an express common intention made by the husband to his wife that the HDB flat was for both for them until their death. Usually, evidence of such an express common intention is absent[61] and the wife would have to prove direct financial contribution to the purchase price in order to establish the element common intention.[62] Does this case signify the beginning of a more liberal Singapore jurisprudence on the common intention constructive trust in relation to married couples and the HDB flat?[63] It is still probably too early to make any predictions based on a single case. Even though *Tan Poh Soon* was decided more than 15 years ago, there are not many Singapore cases that have been argued on the basis of the common intention constructive trust. To date, *Tan Poh Soon* remains the only reported decision on the HDB flat and the common intention constructive trust. It should also be noted that following from *Tan Chui Lian* read with *Koh Cheong Heng*, the common intention constructive trust is not precluded by the current version of the HDA, if the declaration is sought in favour of an eligible person to own a HDB flat. An unresolved difficulty is whether Singapore

61 See, for example, *Walker James Edward v Hong Geok Choo* [1996] SGHC 87, where the claim for the common intention constructive trust failed because the plaintiff was not able to establish a common intention.

62 On proving common intention, see *Jones v Kernott* [2011] 3 WLR 1121.

63 *Cf Chia Kum Fatt v Rolfston v Lim Lay Choo* [1993] 2 SLR(R) 793, where Warren Khoo J refused to consider non-financial contributions in quantifying the shares of the parties.

would follow the recent jurisprudence of the English courts on the common intention constructive trust. The Supreme Court in *Jones v Kernott*[64] said that in looking for a common intention, the court's task is to look for a genuine common intention held by the parties. If such a common intention can be found, then the next stage is to determine the shares of the parties. This inquiry involves a search for the result which parties must, in the light of their conduct, be taken to have intended.[65] A fuller examination of the implications of the case of *Jones v Kernott* is beyond the scope of this article due to space constraints.[66]

40 Despite its rarity in Singapore case law, the common intention constructive trust might provide some relief to the "disinherited foreign wife". This problem stems from the growing phenomenon of local Singaporean men marrying foreign wives from places such as Vietnam or China through matchmaking agencies. In these matchmaking arrangements, typically the man chooses the woman from a photo catalogue and the agency would arrange for the couple to meet either in Singapore or overseas. After meeting several times, the man can choose to marry the woman. In return for its services, the groom has to pay the agency a matchmaking fee that can go up to $10,000.00. In terms of the age profile, the groom is typically older and the wife is much younger. Problem arises when the man passes away and bequeaths the flat not to his wife but his own family, that is his parents or siblings.[67] It is surmised that the primary motivation of such a move is a fear that the foreign wife will realise the proceeds of the HDB flat and return with the children to her country of origin. Another possibility is that the foreign wife is not considered to be part of the family but as an "other".[68] Unfortunately, stereotypical assumption of the foreign woman abound, and Chinese women are sometimes pejoratively referred to as a *wuya* (a crow, which is a Chinese colloquial term for a gold digger). One unexplored legal aspect from this social phenomenon is whether the common intention constructive trust is able to provide relief to the

64 [2011] 3 WLR 1121.

65 See *Stack v Dowden* [2007] 2 AC 432.

66 The literature on this is voluminous. For a sample, see, for example, S Gardner & K Davidson, "The Supreme Court on Family Homes" (2012) 128 LQR 178; R H George, "Cohabitants' Property Rights: When is Fair Fair" (2012) 71 CLJ 39; M Yip, "The Rules Applying to Unmarried Cohabitants' Family Home" [2012] Conv 159; M Pawloski, "Imputed Intention and Joint Ownership – A Return to Common Sense" [2012] Conv 149; J Mee, "*Jones v Kernott*: Inferring and Imputing in Essex" [2012] Conv 167.

67 See, for example, T Tan, "In Sickness & In Death; When Their Husbands Die, Foreign Brides Can Be Left Without Home, Money, or Even the Right to be in S'pore" *The Straits Times* (30 April 2011).

68 See Q Zhou, "Chinese Marriage Migration in Singapore" (2010) (unpublished Masters thesis, National University of Singapore).

disinherited wife in this context? Alcina Chew[69] has begun valuable work in examining the difficulties associated with such a claim. She points out that the main difficulties associated with such claims are as follows:

> (a) In most of these cases, it is very difficult to pinpoint the element of common intention. Due to the fact that in these relationships, the man is generally the dominant party and the wife being younger and meeker, an articulated common intention is rarely found. In *Lloyds Bank v Rosset*,[70] Lord Bridge said that in absence of an express common intention, an inferred common intention may be found if the wife contributed to the purchase price.[71] However, in the context of the foreign wife, the wife is usually a homemaker and does not have the means or opportunity to contribute to the purchase price of the HDB flat.
>
> (b) Even if a common intention could be found, the wife would have problems establishing the necessary detriment. While long criticised by many commentators as sexist, the orthodox doctrine of common intention constructive trust do not consider homemaking duties as satisfying the requisite detriment to invoke the common intention constructive trust.
>
> (c) Even if the foreign wife can satisfy the elements of a common intention constructive trust, the application of the HDA might preclude the declaration of a constructive trust in her favour. This is because the foreign wife might not be a Singapore citizen or permanent resident. In other words, the foreign wife is *ineligible* to own a HDB flat. Therefore, the court is precluded from declaring a constructive trust in her favour.

41 While there are certainly formidable difficulties in establishing such a claim, there is at least one case reported in *The Straits Times* where most of the elements of a common intention constructive trust are satisfied.[72] In this case, the husband was reported to have made a

69 A Chew, "The 'Other' Woman – Equitable Relief for the Disinherited Foreign Wife" (2011) (unpublished undergraduate thesis, National University of Singapore, archived at the C J Koh Law Library, National University of Singapore).

70 [1991] 1 AC 107.

71 *Cf Jones v Kernott* [2011]3 WLR 1121, where the Supreme Court did not mention the requirement for direct financial contribution in order to find an inferred common intention between the parties. S Gardner & K Davidson, "The Supreme Court on Family Homes" (2012) 128 LQR 178 at 179 argues that "[b]y their conspicuous absence, we can conclude that there is no longer any requirement, so as to prove an implied common intention, to point to the claimant's direct financial contributions to the acquisition of the house; nor of detrimental reliance upon the common intention".

72 T Tan, "In Sickness & In Death; When their Husbands Die, Foreign Brides can be Left Without Home, Money, or Even the Right to be in S'pore" *The Straits Times* (30 April 2011).

video recording stipulating that he intended to give his HDB flat to his wife and child. It was also reported that when the man fell ill, the wife borrowed money in order to take care of him and pay for his hospital expenses. *Prima facie*, a strong claim for the common intention constructive trust may be made by the wife against her late husband's estate. However, the principal difficulty in this case is that the wife was not a Singaporean or Singapore permanent resident. Hence, the court may not declare that the HDB flat is held on a constructive trust on her behalf. In any case, the wife and her child were entitled to a three-quarter share of the flat due to the effect of the Intestate Succession Act,[73] with the other one quarter share going to her late husband's daughter from his first marriage. Despite not being applicable on the present facts, it is suggested that lawyers ought to be alert about the fact that the common intention constructive trust might provide some relief in certain circumstances to these vulnerable group of women.

VI. Proprietary estoppel and HDB flats

42 Another underdeveloped area in Singapore jurisprudence is proprietary estoppel[74] claims in the relation to disappointed heirs. In these cases, the usual factual pattern is a defendant who makes a representation to the plaintiff that the plaintiff will inherit the defendant's property; in reliance on this representation, the plaintiff incurs substantial detriment such as either taking care of the defendant or working for the defendant for a long period of time in return for low wages. Subsequently, the defendant decides to bequeath his or her property to someone else or passes away intestate. In the latter situation, the defendant's next of kin would be the one entitled to the property and not the plaintiff. It is in this context that the plaintiff brings an action against the defendant or the defendant's estate in proprietary estoppels, alleging that it is unconscionable for the defendant to renege on his or her representation that the plaintiff is to inherit the defendant's property.

43 In England, there are two very well-known cases where the disappointed heir has succeeded in a claim in proprietary estoppel. In *Gillett v Holt*,[75] the defendant made repeated representations to the plaintiff that the plaintiff would inherit the defendant's estate. In reliance on these representations, the plaintiff worked for the defendant for more than 40 years at very low wages and subordinated his personal

73 Cap 146, 1985 Rev Ed.

74 See generally, *Tan Sook Yee's Principles of Singapore Land Law* (S Y Tan, H W Tang & K Low eds) (LexisNexis, 2009) at pp 153–176.

75 [2001] 3 Ch 210.

and professional life to the defendant's wishes. Unfortunately for the plaintiff, the defendant then developed a relationship with a younger man and chose to bequeath all his property to the younger man. In *Gillett v Holt*, the plaintiff successfully sued the defendant in a claim premised on proprietary estoppel and the English Court of Appeal held that the plaintiff was entitled to some part of the defendant's property. A more recent case is the House of Lords' decision in *Thorner v Major*.[76] The claimant worked on the defendant's farm for no pay for 30 years on the basis of defendant's representation that the claimant would eventually inherit the farm. The defendant passed away intestate and the claimant brought a claim against the defendant's estate on the ground of proprietary estoppel. This claim was allowed by the House of Lords because their Lordships found that all the elements of a claim for proprietary estoppel had been satisfied.

44 Besides the factual pattern of *Thorner v Major* and *Gillett v Holt*, another situation in which a proprietary estoppel may arise is between an elderly person and his or her caregiver. An illustration of such a case is *Jennings v Rice*.[77] The claimant was the defendant's long time general helper and part-time gardener for many years since the 1970s. Since the 1980s, the defendant stopped paying the claimant. Three years before the defendant's death, the claimant took care of the defendant to the extent that he slept on the defendant's couch every night. The defendant assured him that he would see him right and sometimes told him "this will all be yours someday". In the end, the defendant died intestate and the claimant brought an action in proprietary estoppel against the defendant's estate. The English Court of Appeal allowed the appeal and granted the claimant £200,000.00 in satisfaction of the equity that had arisen in his favour.

45 With a rapidly aging population and the shrinking of the nuclear family in Singapore, it is speculated that claims by caregivers against elders based on proprietary estoppel might become increasingly commonplace. Of course, the difficulty with such claims would be the potential impact of the HDA. Thus far, there is one local case which has considered this issue, *Low Heng Leon Andy v Low Kian Beng Lawrence*.[78] The plaintiff lived with his grandmother and his aunt in a HDB flat owned by the grandmother and aunt as joint tenants. The aunt was stricken with cancer and the plaintiff took care of his aunt. Subsequently, the aunt passed away. The grandmother was also in poor health and it was the plaintiff who took care of her as well. The grandmother passed

76 [2009] 1 WLR 776 (noted M J Dixon, "Proprietary Estoppel: A Return to Principle" [2009] Conv 260; B Sloan, "Estoppel and the Importance of Straight Talking" [2009] Conv 154).

77 [2003] 1 P & CR 8.

78 [2011] SGHC 184.

away intestate and the plaintiff's aunts and uncles became entitled to the flat. Since the plaintiff had no beneficial interest in the estate, the grandmother's administrator tried to remove the plaintiff from the flat on the ground that he was an illegal occupier. In response, the plaintiff brought a claim against the estate alleging that the grandmother had promised him that he could live in the flat as long as he wanted and he could use the flat as his family home. In reliance on those promises, the plaintiff acted to his detriment by acting as a caregiver and paying for household and medical expenses. Furthermore, the plaintiff alleged he had given up a more lucrative job and worked from home as a private tutor to take care of his grandmother. The administrator attempted to strike out the plaintiff's claim, *inter alia*, on the ground that the plaintiff's claim was precluded by s 51(10) of the HDA. In refusing to strike out the claim, Assistant Registrar Paul Chan rightly held that the claim did not offend s 51(10) of the HDA because the plaintiff was not seeking an interest in the HDB flat. Instead, the plaintiff was "merely asking for equitable damages in order to satisfy the equity raised".[79] Asst Registrar Chan held that this relief was within the court's discretion to grant and the claim was not barred by s 51(10) of the HDA. The decision of the learned assistant registrar is undoubtedly correct as the claim is framed as a personal claim for equitable compensation. However, it is suggested that s 51(10) of the HDA is not fatal to a proprietary estoppel claim even if the plaintiff had asserted a constructive trust over the HDB flat. Following the jurisprudence on the resulting trust and common intention constructive trust, it is likely that s 51(10) of the HDA would be interpreted purposively so as not to bar a constructive trust claim as long as the plaintiff is eligible under HDB rules to own a HDB flat.

46 An unresolved difficulty is this: if the minimum needed to satisfy the equity is a proprietary interest, what would be the outcome if the claimant is an ineligible person?[80] Would a court be obliged to deny the proprietary interest on the basis of public policy or "illegality" and order a monetary award in lieu of the proprietary interest? There are two responses to this difficult question. First, as a matter strategy, lawyers who are advising a claimant who is ineligible to own a HDB flat must be very careful in asking for the appropriate prayers. It is suggested that as a matter of prudence, such a claimant should ask for a monetary award instead of a proprietary interest. Second, even if an ineligible claimant asked for a proprietary interest, it is contended that such a claimant should not precluded from being granted a monetary award. Such a monetary award is meant to satisfy an equity that has been raised due to a representation made by the defendant to the claimant. Unlike

79 [2011] SGHC 184 at [62].

80 The author is grateful to the anonymous referee for raising this point.

PP v Intra Group (Holdings) Co Inc,[81] where an award of a monetary remedy would have the effect of undermining the Residential Property Act,[82] the underlying policy of the HDA is not compromised by a monetary award in the context of proprietary estoppel claim.

47 Before leaving this section, it should be mentioned that the doctrinal flexibility of the remedy in proprietary estoppel claims might make it attractive for a plaintiff who is ineligible under HDB rules to own a HDB flat. With reference to the facts reported in *The Straits Times* about the foreign wife who took care of her husband and borrowed money for his medical bills, if the requisite representation was present, the wife could maintain a proprietary estoppel claim against the estate. Her immigration status as a person ineligible to own a HDB flat would not be fatal to the claim because like the claimant in *Low Heng Leon Andy v Low Kian Beng Lawrence*,[83] she could frame her remedy as one seeking equitable compensation and not an interest over the flat. Of course, this would be a weaker claim and may yield a lesser amount in terms of monetary value. As discussed above, the wife in that case need not resort to a common intention constructive trust or proprietary estoppel claim because she had a share over the HDB flat by reason of the Intestate Succession Act.[84]

VII. *Donatio Mortis Causa* and HDB flats

48 The final equitable doctrine in relation to HDB flats discussed in this paper is *donatio mortis causa*, which is a gift that is conditional upon death. In *Koh Cheong Heng v Ho Yee Fong*[85] ("*Koh Cheong Heng*"), the plaintiff and defendant were an elderly married couple with no children. Initially, the plaintiff was the sole owner of a HDB flat. In 2006, while the plaintiff was in the hospital and thinking he would not recover from his illness, he transferred the HDB flat to himself and the defendant, as joint tenants. The plaintiff recovered from his illness but, unfortunately, the defendant suffered a fall two years later and became gradually incapacitated. Subsequently, the plaintiff became concerned that should he predecease the defendant, the flat would eventually be distributed to the defendant's relatives in accordance with the Intestate Succession Act.[86] The plaintiff was not happy about this possible outcome and sought to revoke the gift using the doctrine of *donatio*

81 [1999] 1 SLR(R) 154.
82 Cap 274, 2009 Rev Ed.
83 [2011] SGHC 184.
84 Cap 146, 1985 Rev Ed.
85 [2011] 3 SLR 125 (noted R Leow, "*Donatio Mortis Causa* of Registered Land in the Singapore High Court: *Koh Cheong Heng v Ho Yee Fong*" (2011) 25 *Trust Law International* 145).
86 Cap 146, 1985 Rev Ed.

mortis causa. After reviewing the facts, Judith Prakash J held that the plaintiff's transfer of the flat to himself and the defendant was a valid *donatio mortis causa*. In cases of gifts transferred pursuant to the doctrine of *donatio mortis causa*, the learned judge held that such a gift remains defeasible until the death of the donor. In other words, the donor had the power to revoke the gift if the donor did not eventually pass away. Prakash J reasoned that this power of revocation is best explained by way of a remedial constructive trust, where the court enjoyed the discretion to determine whether a proprietary remedy should be granted.[87] While acknowledging criticism of the possible wide ranging effect of the remedial constructive trust, the learned judge held that using the remedial constructive trust to explain the theoretical basis of the power of revocation in this context would not result in widespread uncertainty. Prakash J held that such a rationalisation of the power of revocation did not offend the HDA because the plaintiff was not an *ineligible* person to own a HDB flat. Adopting a purposive interpretation of the HDA, the learned judge allowed the plaintiff to revoke the transfer of the flat.

49 It is respectfully suggested that the power to revoke gifts should be exercised with extreme circumspection. As a matter of policy, a too generous doctrine of revocation has the effect of undermining security of receipts. This author has argued elsewhere that gifts are not inconsequential and unimportant transactions that should be easily set aside.[88] Furthermore, as a matter of doctrinal analysis, *Koh Cheong Heng*[89] does not rest on a very stable foundation. The primary authority relied on in *Koh Cheong Heng* is the case of *Staniland v Willott*[90] for the proposition that a *completed* gift made pursuant to the doctrine of *donatio mortis causa* may be revoked. However, it is should be pointed out that in substance, the remedy that the plaintiff was seeking was the rescission of a completed gift. In this regard, the relevant test to rescind a gift is the "serious mistake" test as articulated as follows by Lindley LJ in *Ogilvie v Littleboy*:[91]

> In the absence of all circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.

87 On remedial constructive trust, see H W Tang, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 142–148. See also T H Tey, "Constructive Trusts – Deciphering and Distinguishing 'Institutional' and 'Remedial'" (2011) 23 SAcLJ 250.

88 H W Tang, "Restitution for Mistaken Gifts" (2004) 20 JCL 1.

89 *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125.

90 (1852) 3 Mac & G 664.

91 (1897) 13 TLR 39.

50 *Pitt v Holt*,[92] a recent English Court of Appeal decision, has endorsed the "serious mistake" test in relation to rescission of a mistaken gift.[93] Unless it is suggested that *Staniland v Willott*[94] survives as a *sui generis* doctrine to govern the revocation of gifts in the context of *donatio mortis causa*, there is a strong case to be made that the test for rescission of completed gifts is based on the "serious mistake" test. Thus, the primary inquiry is whether the plaintiff in *Koh Cheong Heng*[95] was under a "serious mistake" that he would not survive for long when he made the gift to his wife. It is respectfully suggested that there are grave difficulties in construing such a gift as a form of "serious mistake". Too generous a view of a "serious mistake" might lead to many gifts being rescinded. On the facts of *Koh Cheong Heng*, it could be argued that this was not a case of a mistake but a regretted decision. If the plaintiff had indeed passed away shortly after the gift was made, the property would eventually have gone to his wife's relatives. Why should he then have cause for complaint in these circumstances? It seems that this is a situation where there is no real mistake associated with the transfer but rather a failure to consider the implications of joint tenancy and succession law. In any case, the plaintiff could have either severed the joint tenancy or characterised his claim as one premised on the doctrine of resulting trust. There was no need to invoke the doctrine of remedial constructive trust which is fraught with uncertainty.

VIII. Conclusion

51 In this article, the jurisprudence pertaining to the express trust, resulting trust and common intention constructive trust, proprietary estoppel and the HDB flat have been reviewed. It is suggested that if these doctrines are analysed properly and sensitively with regard to HDB policies, they still have an important role to play in regulating the relationships of those who might have a claim over HDB flats. In particular, the doctrines of the common intention constructive trust and proprietary estoppel might provide some relief to the disinherited wife. This article also suggests that there might, in future, be claims against HDB flats via proprietary estoppel by disappointed heirs. With respect to revocation of gifts by way of the use of *donatio mortis causa*,

92 [2011] 3 WLR 19.

93 It has been suggested to me that the *donatio mortis causa* is a common law doctrine of conditional gift and the criticism of *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 by reference to *Pitt v Holt* [2011] 3 WLR 19 is misplaced. *Pitt v Holt* [2011] 3 WLR 19 expounds the doctrine of mistake as applied by the courts to equitable transfers of property which is far removed from *donatio mortis causa* cases. The author is unconvinced by this argument. There does not seem to be any reason why the law should maintain different rules in relation to what is essentially a similar problem, the rescission of a completed gift.

94 (1852) 3 Mac & G 664.

95 *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125.

the author would advise caution in adopting too generous a view of rescission of a gift for essentially what is a regretted decision.
